IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

BEDROCK COMPUTER TECHNOLOGIES LLC,	§	
	§	
Plaintiff,	§	
	§	**CASE NO. 6:09-cv-269-LED**
v.	§	
	§	**Jury Trial Demanded**
SOFTLAYER TECHNOLOGIES, INC., et al.	§	
	§	
Defendants.	§	

BEDROCK'S RESPONSE IN OPPOSITION TO AOL'S EMERGENCY MOTION FOR LEAVE [DKT. NO. 505]

I. INTRODUCTION

After submitting both summary judgment and *Daubert* letter briefs on this issue, one of which this Court has already denied, AOL again asks the Court to rule as a matter of law that infringement of a system claim must be proven by evidence of actual use. Because AOL did not first submit a letter brief, has not presented any "new" argument, and relies upon an erroneous interpretation of the law, Bedrock respectfully requests that AOL's motion be denied.

II. ARGUMENT

A. AOL Should Have Moved for Leave to File a Letter Brief Rather Moving to Outright File a Summary Judgment Motion.

Under this Court's Order regarding pretrial motions, any party seeking to file a motion for summary judgment must first submit a letter brief. Dkt. No. 339. AOL has not complied with the letter brief requirement and, without leave, filed its motion for summary judgment. AOL's motion should be denied at least for the reason that it has not complied with the Court's Order.[1]

B. AOL Presents No "New" Arguments.

Despite the Court's admonition to AOL at the February 16th hearing that it must show "new" grounds for summary judgment in this Motion, AOL now presents for the fourth time its erroneous argument that infringement of a system claim must be proven by evidence of actual use.

[1] AOL insists that a departure from the established procedure is necessary because there are "just seven weeks until trial, and only five weeks until the pre-trial conference." Yet, AOL also argues that Bedrock cannot be prejudiced by the allowance of its motion because trial is "still two months away" and because there is still "sufficient time" to resolve this issue. AOL cannot have it both ways. Either there is enough time for the Court to properly dispose of this issue before trial, or the timing of AOL's motion is prejudicial to Bedrock.

January 12, 2011: AOL first raised its erroneous view of infringement of system claims, citing the *ACCO*[2] and *Typhoon*[3] cases, in a letter brief requesting leave to file a motion for summary judgment of non-infringement. *See* Dkt. No. 378 ("*ACCO* Brief 1"). The Court denied AOL's request in its February 1, 2011 Order. *See* Dkt. No. 450. The Court, however, permitted the Defendants to file a motion of non-infringement. *See id.*

February 8, 2011: Despite the Court's denial of AOL's request to file a motion for summary judgment, the Defendants included this argument (again relying on the *ACCO*/*Typhoon* cases) in the Defendants' Motion for Summary Judgment of Non-Infringement. *See* Dkt. No. 463 at 26-27 ("*ACCO* Brief 2").

February 14, 2011: AOL recast its *ACCO*/*Typhoon* argument as a *Daubert* challenge against Bedrock's expert. *See* Dkt. No. 484 ("*ACCO* Brief 3").

February 16, 2011: During the status conference, after having already received Defendants' *Daubert* letter brief, the Court made clear that AOL must show "new" grounds for summary judgment in this Motion.

February 22, 2011: AOL filed the Motion at hand, Dkt. No. 505, which asks the Court to accept its already-filed motion where AOL again briefs its erroneous *ACCO*/*Typhoon* argument, Dkt. No. 507 ("*ACCO* Brief 4").

AOL recites case law outlining a good cause standard for motions for leave. *See* Dkt. No. 505. Good cause is irrelevant. At the hearing in February, the Court repeatedly told AOL that it must assert "new" grounds for summary judgment in this motion. There is nothing new about AOL's argument. Quite the opposite, this is the fourth time it has briefed its misguided

[2] *Acco Brands, Inc. v. Micro Sec. Devices, Inc.*, 346 F.3d 1075 (Fed. Cir. 2003)

[3] *Typhoon Touch Techs. v. Dell, Inc.*, Case 6:07-cv-00546, 2009 WL 2243126 (E.D. Tex. July 23, 2009)

ACCO/*Typhoon* argument. Further, because this is a purely legal issue, AOL cannot contend that the deposition testimony of Bedrock's expert justifies leave in any way.[4] Even AOL admits that its argument is a "purely legal issue." *See* Dkt. No. 505, heading B at page 3 ("AOL'S MOTION FOR SUMMARY JUDGMENT IS PURELY A LEGAL ISSUE"). Because AOL's motion is not new, AOL's motion for leave should be denied.

C. Evidence of Use Is Not Required to Establish Infringement of a System Claim.

Even if addressed on the merits, AOL's argument is premised on the faulty notion that a patentee must present evidence of use to establish infringement of a system claim. This is an incorrect interpretation of the controlling law. Rather, claims governed by 35 U.S.C. § 112 ¶ 6 are construed to "cover the corresponding structure, material, or acts described in the specification and equivalents thereof," and the Court has construed the means-plus-function claims in this case to cover the algorithms disclosed in the patent. *See* Dkt. No. 369. Thus, to prove infringement, Bedrock must prove that AOL's systems have the claimed structure and that this structure has the capability of functioning as described by the claim. *See Mass Engineered Design, Inc. v. Ergotron, Inc.*, 633 F. Supp. 2d 361, 378 (E.D. Tex. 2009) (Davis, J.) ("All that is required is that the device have the claimed structure, and that this structure in the device have the capability of functioning as described by the claim.").

III. CONCLUSION

This Court should not be required to waste its limited resources analyzing this issue a fourth time. *See Retractable Techs. v. New Med. Techs.*, No. 4:02-CV-34, 2004 U.S. Dist.

[4] AOL contends that its motion "could not have been brought prior to Mr. Jones' admissions at his depositions." One of the four times that AOL briefed its *ACCO*/*Typhoon* argument, however, was prior to Dr. Jones's deposition. *See* Dkt. No. 378 (filed January 12, 2011, which was prior to Bedrock's expert's deposition in early February).

LEXIS 3855, at *28 (E.D. Tex. Jan. 8, 2004) (Davis, J.) (refusing to "indulge [Defendant's] request for duplicative analysis"). In light of the foregoing, Bedrock respectfully requests that the Court deny AOL's Emergency Motion for Leave to File Its Motion for Summary Judgement (Dkt. No. 505) and strike AOL's Motion for Summary Judgment of Noninfringement of U.S. Patent No. 5,893,120 for Lack of Performance (Dkt. No. 507).

DATED: March 1, 2011

Respectfully submitted,
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/s/ *Douglas A. Cawley*

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the forgoing document via the Court's CM/ECF system pursuant to the Court's Local Rules this 1st day of March, 2011.

/s/ Ryan A. Hargrave
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